UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DUPONT SPECIALTY PRODUCTS USA, LLC	)	
and	)	**Case 05-CA-222622**
AMPTHILL RAYON WORKERS, INC. LOCAL 992, INTERNATIONAL BROTHERHOOD OF DUPONT WORKERS	)	

DUPONT'S MOTION FOR RECONSIDERATION

Pursuant to Section 102.48(c)(1) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Respondent DuPont Specialty Products USA, LLC ("DuPont" or "Company") respectfully takes the extraordinary step of moving for reconsideration of the Board's July 8, 2020 decision. *See* 369 NLRB No. 117.

The Board held that DuPont violated Section 8(a)(5) of the Act by failing to engage in decision bargaining over the subcontracting of *volunteer* Emergency Response Team ("ERT") work. This ERT work had long been a volunteer opportunity available to numerous DuPont employee groups, including the Ampthill Rayon Workers, Inc., Local 992 ("ARWI" or "Union") production and maintenance bargaining unit, the International Brotherhood of Electrical Workers ("IBEW") bargaining unit, and non-union DuPont employees. This variable collection of employee volunteers performed the ERT's fire brigade, hazmat, and medical emergency response duties outside the scope of their regular duties and work schedules. The ARWI collective bargaining agreement never recognized the work as part of the unit scope, either in the recognition clause or work classification sections, and the Union failed to negotiate any restrictions on the variable offering of ERT work.

The Board's decision erred by rejecting the contract-coverage defense to the Section 8(a)(5) failure to bargain allegations. *See MV Transportation, Inc.*, 368 NLRB No. 66 (2019).[1] The Board looked for – and did not find – contract language addressing subcontracting or outsourcing of bargaining unit work. But that is the wrong question and, correspondingly, the Board reached the wrong answer. This dispute involves contract language providing a sufficient basis for management to alter and/or eliminate ERT work assignments:

- This dispute implicates the 2012 CBA's recognition clause, Article I, which defines the bargaining unit as a production and maintenance unit.
- ERT work is not production or maintenance work; it is entirely volunteer work performed outside of the employees' regular job duties and work schedules.
- The ERT work was *shared with the IBEW bargaining unit and non-union employees*, meaning the ARWI unit had no claim to exclusive jurisdiction to perform this extra volunteer work.
- The ERT work was not part of the defined list of ARWI job classifications, work assignments, or wage rates covered by Article IV in the CBA.
- Article IX in the CBA afforded management and supervision the right to perform or re-assign safety work, and ERT work clearly is "safety" related.

Thus, the proper questions are whether the volunteer ERT work is bargaining unit work and, if so, whether DuPont retained a contractual right *not to assign* that work to ARWI bargaining unit employees. Those are questions an arbitrator (or a court) can decide, and the complaint should have been dismissed under the contract-coverage test.

[1] DuPont's motion does not address the Board's separate holding that the decision to subcontract ERT volunteer work amounted to a mandatory subject of bargaining under *Fibreboard* and its progeny. DuPont, however, reserves the right to seek federal court review on this issue and other issues.

I. Reconsideration Is Warranted Because the Board Erred in Rejecting the Contract-Coverage Defense Raised By DuPont.

A. The Board's Definition of the Contract-Coverage Test Under *MV Transportation*.

The Board's decision in *MV Transportation* was intended to end the decades of conflict with the federal courts over the Board assuming the role as an unnecessary *third forum* (in addition to arbitration and the federal courts) for interpreting and resolving labor contract disputes. The Board explained in *MV Transportation* that "[t]he duty to bargain continues during the term of a collective-bargaining agreement [only] with respect to mandatory subjects of bargaining not covered by the agreement." 368 NLRB No. 66, slip op. at 3. If the parties already have bargained over terms regarding a certain issue or topic, like defining job classifications and work assignments under the labor contract, then bargaining is not required mid-contract. *Id.*

In assessing whether the issue is "covered," the Board conducts a limited review of the plain language and will "ensur[e] that *all* provisions of the parties' agreement are given effect," without "selectively applying exacting scrutiny only to those provisions of a labor contract that vest in the employer a right to act unilaterally." *Id.* at 9. And, most notably, the Board explained that when it reviews the labor contract, "*we will not require that the agreement specifically mention, refer to or address the employer decision at issue*." *Id.* at 11 (emphasis added); *see also ADT, LLC*, 369 NLRB No. 31 (Feb. 27, 2020).

B. Proper Application of the Contract Coverage Test Here Should Have Resulted in Complaint Dismissal.

In search of a contract provision that addressed "subcontracting" or "outsourcing" rights *for bargaining unit work*, and finding none, the Board summarily affirmed without explanation the ALJ's rejection of the Company's contract-coverage defense. 369 NLRB No. 117, slip op. at

16–17. But in doing so, the Board's decision failed to "ensur[e] that *all* provisions of the parties' agreement are given effect" as *MV Transportation* requires. *MV Transportation*, 368 NLRB No. 66, slip op. at 9.

The first question here is whether the ERT work is bargaining unit work under the recognition clause of the CBA in effect at the time of the subcontracting:

ARTICLE I

DEFINITIONS

Section 1. The unit of employees represented by the UNION is composed of production, maintenance, service and Plant technical hourly wage roll employees at the Plant included within the unit appropriate for collective bargaining purposes certified in an order of the National Labor Relations Board in cases Nos. 5-R-2724, 5-R-2773, 5-R-2791 bearing date of January 31, 1947, but excluding all employees classified as instructors, instructresses, security officers, Limited Service Employees, employees when working as relief supervisors and supervisors-in-training, and all supervisory employees set forth in said cases with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

Section 2. The term "employee" or "employees" shall mean any or all of those employees at the Plant included within the bargaining unit set forth in Section 1 of this Article.

The ERT roles – which perform fire brigade, hazmat, and medical emergency duties – are not production, maintenance, service, or technical roles under this unit scope. Such duties are beyond the normal scope or qualifications of bargaining unit employees and, in fact, require specialized trainings and certifications for the employee volunteers.

Despite DuPont having made volunteer openings to its employees to perform ERT functions above and beyond their ordinary jobs, the original ARWI certifications and bargained-for unit scope over many decades never covered ERT work. The General Counsel's sole

witness, Union Grievance Chairman Donny Irvin, even admitted that the work at issue could be performed by local first responders (Chesterfield County) given its nature. Tr. 202:19–25.[2]

Second, Article IV, which defines the wage rates and job classifications under the labor contract, further demonstrates that ERT roles are not bargaining unit positions:

ARTICLE IV

WAGES

Section 1. A copy of hourly wage rates and job classifications for all hourly roll employees covered by this Agreement and any subsequent revision of these rates and job classifications shall be furnished to the UNION by the COMPANY. A list of job write-ups from which such job classifications were made shall be made available to the UNION Officers and Directors at their request.

Any bargaining unit employee who voluntarily performed the additional ERT duties *remained in his existing classification and rate of pay* (albeit, at overtime pay if performed beyond regular working hours and applicable overtime entitlement). 369 NLRB No. 117, slip op. at 4.

The ALJ acknowledged that DuPont *variably assigned* the ERT roles to volunteers in several employee groups to handle often on overtime, including employees in the IBEW bargaining unit and non-union employees at the site. 369 NLRB No. 117, slip op. at 4 ("Like a community volunteer fire department, the ERT-member employees worked their regular production, maintenance, or other jobs at the facility," and responded to the ERT needs in

[2] Although the case record does indicate past "bargaining" between DuPont and ARWI on issues regarding the ERT volunteer assignments, such as scheduling or training issues, this bargaining can easily be characterized as *effects bargaining* emanating from the Company's periodic decision(s) to staff the ERT roles with Company employees, rather than vendor employees or simply relying on outside county responders in emergency situations. Moreover, such bargaining history evidence does not impact the contract-coverage test, but instead is applicable to the traditional waiver analysis, as the Board explained in *MV Transportation*, 368 NLRB No. 66, slip op. at 2, 2 n.7, 12.

addition to their regular jobs). Management thus retained the right to assign or not assign this work because it fell outside the recognized and bargained-for "wage rates and job classifications" under the CBA.

Third, Article IX supports the contract-coverage defense as related to volunteer ERT work. Even if the ERT volunteer roles could be characterized as *de facto* bargaining unit positions, those positions remained at their core "safety" roles for the Company. Article IX, Section 9 expressly provides that management can perform – without using bargaining unit employees – such "safety" work even if production or maintenance-related:

> Section 9. Supervision will not perform production or maintenance work ordinarily done by employees covered by this Agreement, except they may perform such work in the interest of safety or in the preservation of COMPANY property or in the performance of duties such as instruction, training, work during emergencies or for the purpose of investigation, inspection, experimentation and obtaining information when production or equipment difficulties are encountered.

In sum, this is the quintessential case of contract interpretation under *MV Transportation.* The Board's decision is incorrectly premised on the absence of subcontracting or outsourcing language, but that does not remove this dispute over the Company's right to act from the arena of contract interpretation given the *type of work* at issue.[3] *See MV Transportation* 368 NLRB No. 66, slip op. at 11 ("[W]e will not require that the agreement specifically mention, refer to or

[3] Not only did the Board impermissibly intrude into the arena of contract interpretation, but the Board did so incorrectly by adopting the ALJ's decision without comment. The ALJ cited in part the September 1, 2018 CBA, which took effect *after* the alleged failure to bargain in mid-2018, and addresses the subcontracting of *maintenance work*. This contractual language, called the Contract of Work Procedure in Addendum E, has nothing to do with volunteer ERT work. Yet the ALJ viewed the September 1, 2018 language providing for a contractual notice and discussion framework to retroactively support a decision bargaining obligation with ARWI over the ERT work *months earlier*. 369 NLRB No. 117, slip op. at 17.

address the employer decision at issue."). Therefore, the Board should reconsider its decision as contrary to *MV Transportation.*

II. Reconsideration Is Warranted to Preserve the Proper Balance Between Board, Arbitrator, and/or Federal Court Jurisdiction to Resolve Disputes Over Collective Bargaining Agreement Rights and Terms.

MV Transportation also made clear that "arbitrators and courts are still the principal sources of contract interpretation." 368 NLRB No. 66, slip op. at 6 (citations omitted). Federal labor policy, under Section 203(d), promotes grievance-arbitration as "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *Id.* at 7 (citations omitted). Despite this policy, the Board understood that a union "will naturally prefer that the Board determine the lawfulness of an employer's disputed unilateral action," which in part led the Board to adopt the contract-coverage test. *Id. MV Transportation* was intended to remove "any incentive to bypass grievance arbitration." *Id.* at 9.

The Board's categorical adoption of the ALJ's decision on contract coverage perpetuates what *MV Transportation* sought to correct – the "natural preference" to bypass the grievance arbitration process – and, instead, use the Board to resolve mid-contract disputes over a union's entitlement to extra-unit work. The Board should not displace the role of an arbitrator in disputes such as this, even if there is no provision on subcontracting or outsourcing decisions. *See E. I. Dupont de Nemours and Co.*, Inc., 293 NLRB 896, 897 (1988) (concluding that the labor contract effectively "covered" a dispute over a change in unit work assignments, for deferral purposes, even though the contract did not contain an express management right to alter work assignments); *see also Hoffman Air & Filtration Sys., Div. of Clarkson Indus., Inc.*, 312 NLRB 349, 353 (1993) (deferring unilateral change claims involving subcontracting and work

assignments to arbitration as sufficiently grounded in the contract, even though the contract contained no provision specifically addressing subcontracting). As the Board explained in *E. I. Dupont*, "arbitrators frequently find that customs and past practices may become part of the 'law of the shop' and thus enforceable through arbitration, even if they are not part of the written contract." 293 NLRB at 897.

The Board should thus reconsider its July 8, 2020 decision because it is contrary to the public policy behind *MV Transportation* and analogous precedent in the deferral context.

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Respectfully Submitted,

David R. Broderdorf
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5817
david.broderdorf@morganlewis.com

Co-Counsel for DuPont

Theresa A. Queen
David G. Barger
GREENBERG TRAURIG LLP
1750 Tysons Boulevard, Suite 1000
McLean, VA 22102
(703) 903-7516
queent@gtlaw.com
bargerd@gtlaw.com

Co-Counsel for DuPont

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Reconsideration was served, via E-mail, on August 5, 2020, upon the following:

Andrea Vaughn
Field Attorney
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles St., Suite 600
Baltimore, MD 21201
Andrea.Vaughn@nlrb.gov

Counsel for the General Counsel

Kenneth Henley, Esq.
Law Office of Kenneth Henley
Suite 704, 1400 S. Ocean Boulevard
Boca Raton, FL 33423-8533
Kenneth.Henley@gmail.com

Representative for the Charging Party

s/ David R. Broderdorf
David R. Broderdorf